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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ROSS B. MERETSKY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY

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I.

Holland did no more than condemn inconsistent-with-innocence language as appropriate for jury instructions. The principle, as a useful standard for measuring the ade-

quacy of proofs, was not altered.[1] Indeed, it was the very standard used by the *Holland* court.

> When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proofs depends upon its effective negation of reasonable explanation by the taxpayer inconsistent with guilt. 348 US at 135.

Two pages later the Court continued:

> But petitioners claim the government failed to adduce adequate proof because it did not negative all the possible nontaxable sources of the alleged net worth increases—gifts, loans, inheritances, etc. We cannot agree. The government's proof, in our view, carried with it the negatives the petitioners urge.

In *Barnes v. United States*, 412 US 837, 845 (1973), the Court again used the yardstick, there to sustain the conviction.

> The evidence . . . provided no plausible explanation for such possession consistent with innocence.

[1] The courts often recognize that a statement of a legal rule, useful to the profession, may not be proper for a jury instruction.

> What we write is written for minds drilled in the ways of the common law, skilled in applying legal abstractions to evidentiary facts, and not for the instruction of jurors. That frequently difficult task of jury instruction rests in the first instance with the trial judge who must translate our legal rulings, cast in the law's shorthand abstractions, into language comprehensible by the jury . . .
>
> *In Re Woods Estate*, 132 NW 2d 35, 45 (374 Mich 278, 1965).
>
> See also *Cuthbert* v *United States*, cited in our petition.

In *Ingram v. United States*, 360 US 672, 679, 680 (1959), the test was used to overturn a conviction.

> Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted . . . What was said in Direct Sales Co. v. United States on behalf of a unanimous Court is of particular relevance here: " . . . the evidence of knowledge [must not be] equivocal."

The government argues that the confusion of the lower courts on the proper standard has not yet stratified into a conflict of the Circuits, and therefore the issue is not ready for resolution here. Whether the premise of this proposition is true or not—the cases our petition cites substantially refute it—the issue should be settled.

If the reasonable doubt requirement of *Winship* cannot be defined more clearly than it has been by the lower courts, then, rather than a promise of fairness, it is a mere abracadabra useful only to soothe judicial consciences. We must admit to a jurisprudential anarchy under which a possibly innocent man's fate will turn upon the subjective view of the judge before whom he happens to appear rather than a rational rule of law. An innocent man facing the terror of a criminal prosecution is entitled to something more.[2]

[2] If we had a mandatory claim on this Court's jurisdiction, sufficiency of evidence would be our first point. But our petition recognizes that the primary responsibility for reviewing that issue rests with the Court of Appeals. *Hamling v. United States*, 418 US 87, 124 (1974). Thus, Footnote 2 of the government response is as inane as it is inaccurate.

II.

On p. 7, fn. 3, of its response, the government nakedly assets that petitioner was not prejudiced by the limitations on his proofs. Even the trial judge recognized that there was *some* prejudice to petitioner in his ruling. Responding to the artless suggestion of Government counsel that petitioner could simply say that the $3900 was for legal services, the trial judge said:

> [The jury] might not be convinced by an explanation that doesn't give to the jury all of the facts. Certainly you must consider, as a good lawyer, that from the defendant's point of view, that it may have more probative value for Mr. Meretsky to thoroughly explain what the $3900 was for than to simply say it was for legal services. (Tr. 1311)[3]

III.

We are chided for failing to point to any hearsay which the jury improperly considered against petitioner. (Government response, p. 8). Not having polled the jury on this point, we cannot comply. But, based solely on hearsay,

[3] Since petitioner did not receive one penny of the nearly half a million dollars garnered by Pagoto and Cimini in fraudulent loans, full explanation was crucial on the issue of whether petitioner had a stake and interest in the venture.

the Solicitor General attributes to petitioner authorship of an agreement which probably never existed.[4]

That trained counsel could make the mistake of implicating petitioner in the conspiracy on the basis of what Pagoto said that Cimini said, highlights the urgent need for some protection from hearsay for one attempting to defend himself from a conspiracy charge. A limiting instruction at the time the hearsay is received is the least that fairness requires.

Respectfully submitted,

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Dated: September 30, 1975.

[4] Petitioner prepared an agreement the terms of which prohibited Tomlinson from selling the stock . . . (Government response, p. 5).

No such agreement was introduced, and the only evidence concerning it was the following testimony of Pagoto.

> Q. What about the agreement?
> A. A copy of the agreement also were filed in—I was hypothicating the stock and the agreement that Mr. Kent Tomlinson wouldn't sell them or use them again in other transactions.
> Q. How did this agreement come up? Who first stated you needed an agreement?
> A. Mr. Cimini. He insisted on having an agreement at the other end.
> Q. And was there anything said by Mr. Cimini as to who was going to prepare this particular agreement?
> A. Yes, his attorney, Ross Meretsky.
> Q. And did Mr. Cimini tell you that?
> A. Yes, sir.

Petitioner's counsel did not object to this testimony. But he had already made two hearsay objections, coupled with a request for limiting instructions which were both denied.

> No legitimate state interest would have been served by requiring repetition of a patently futile objection, already trice rejected, in a situation in which repeated objection might well affront the Court or prejudice the jury beyond repair.
>
> *Douglas v. Alabama*, 380 US 415, 422 (1965).